United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1203 ORIGINAL

To be argued by
STEPHEN K. CARR

B
P/S

In The

United States Court of Appeals

For The Second Circuit

FRANK D. BALECHA,

Plaintiff-Appellee,

vs.

UNION CARBIDE CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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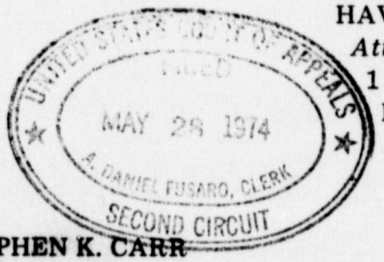

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TABLE OF CONTENTS

Cases Cited

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1203

FRANK D. BALECHA,

Plaintiff-Appellee,

-against-

UNION CARBIDE CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether, in the interest of justice, a new trial must be granted where the Trial Court abused its discretion in prohibiting defendant's fundamental right of cross-examination of the plaintiff, the only fact witness produced during plaintiff's case, on two of the

three major issues in the action.

STATEMENT OF FACTS

Plaintiff-seaman brought this action to recover damages for injuries allegedly sustained as a result of two accidents aboard defendant's vessel, the s/s Carbide Texas City, on March 27, 1972, and March 8, 1973, respectively.

The 1972 accident aboard the Carbide Texas City involved an injury to plaintiff's left shoulder when he slipped in an allegedly unseaworthy accumulation of water due to a leaking refrigerator in the crew messroom and fell against a bulkhead.

The 1973 accident aboard the same vessel took place when plaintiff caught and fractured a finger on his left hand in a heavy refrigerator door located elsewhere aboard the vessel. Plaintiff claims that this hand injury, which disabled him further for two more months, resulted not from an unseaworthy condition but because of a residual "weakness" in his left shoulder.

The case was called for trial on October 1, 1973, by Honorable Lloyd F. MacMahon. The Jury was selected by 11:35 a.m. that day. The case was given to the Jury at 12:30 p.m. the following day, October 2, 1973. In that one day interval, opening statements

were followed by testimony from six witnesses (plaintiff and his two medical experts, defendant's two fact witnesses and one medical expert). The case concluded with summations, and charge, and was given to the Jury six trial hours after it began. Interspersed within this time period, the Court also conducted a sentencing (U. S. v. Fonte) and arranged to have a jury selected in the following civil trial (245a), thereby adding pressure to the already high-speed proceedings. On the afternoon of October 2, 1973, the Jury returned a General Verdict in plaintiff's favor for $18,100.

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, defendant timely moved to set aside the verdict on the grounds that the Court abused its discretion in restricting defendant's cross-examination of the plaintiff to events culminating on March 27, 1972, the date of the first accident. Consequently, defendant was denied the right to cross-examine plaintiff regarding his second accident, as well as the disputed medical facts. On January 7, 1974, the Trial Court denied the motion for a New Trial (243a), maintaining that it had properly exercised its discretion in curtailing a "prolix and pointless"

(245a) cross-examination, and holding, in any event, that any such error was "harmless" (248a).

THE PROOF

During the Trial, plaintiff testified on direct examination that he first joined the Carbide Texas City in December, 1970, as a Pantry Utility (12a), having served in the Merchant Marine since 1942 (11a).

Plaintiff testified that on the morning of March 27, 1972, he picked up a small garbage can in his pantry, half filled with garbage, and stepped into the crew mess on his way to the door leading to the fantail to dump the garbage. As he entered the crew mess, he saw messman Pink Norwood busy mopping the deck immediately in front of him (15a). Plaintiff asked for and obtained permission from Norwood to proceed across the freshly mopped floor (45a). Plaintiff stated that as he approached the refrigerator, his right foot slipped and he fell against the bulkhead, striking his left shoulder.

Plaintiff testified that he reported his accident to Chief Steward Britton at noon time that day (18a), and to the Third Mate after cutting his finger the following day (18a). Nevertheless, plaintiff stated that he continued to work for several more voyages

in the pantry until he requested a Master's Certificate in July, 1972 (28a).

Plaintiff's theory of liability was bottomed on a leaking refrigerator, a condition which he claimed arose on March 25, 1972, two days before his accident (Opening Statement 7a, 8a). The entire proof on this point consisted of plaintiff's direct testimony. Despite repeated admonitions by the Court to confine his testimony to his own observations -- not to what the absent messman Norwood said (15a, 45a) -- plaintiff offered little direct evidence on a leaking refrigerator. When counsel asked plaintiff what he had seen on deck after the accident, plaintiff replied "a skid mark." Counsel pressed on to establish the deck condition around the skid mark. The surprising answer, "It was nice and clean, very clean," (23a), prompted a further question as to the cause of the skid. At that point, the only direct testimony concerning a "leaking refrigerator" was offered:

> "There is water under the refrigerator and the water drop off on the motor. Naturally, the motor got wet with that water coming out under the Frigidaire." (23a)

The water was then described as flowing "out under the Frigidaire" (23a). Plaintiff added that he had seen this leak under the messroom refrigerator on one prior

occasion, two days before his accident (24a). Plaintiff admitted there was another route available to the fantail where garbage was dumped, through the galley, but that Chief Steward Britton forbade him to use that route (13a, 14a).

Plaintiff testified that he was under treatment for pain in his shoulder from July 10, until October 26, 1972. Plaintiff then returned to the Carbide Texas City in October, 1972, and sailed for a month until laid off for dry dock. He rejoined the vessel in January, 1973 and sailed until his second accident on March 8, 1973. On that day, plaintiff stated that he was picking up stores in the ship's chill box. As he was leaving the chill box, he tried to brake the swinging insulated door on his right (34a) with his left shoulder (sic 34a). However, plaintiff claimed that his left shoulder went "numb" (35a), causing him to lose control of the 500 pound door (36a) and somehow catch his left hand in the door as it swung closed. Plaintiff identified photographs (Plaintiff's Exhibit 1), of the ice box door which is hinged on the right side as one emerges from the chill box. Plaintiff sought medical treatment for the finger as soon as the vessel arrived in Galveston on March 12, and then transferred to the Stapleton Marine

Hospital in New York City. There he resumed treatment on March 15, 1973, until declared Fit For Duty on May 29, 1973, with respect to both his shoulder and his broken finger. Plaintiff rejoined the vessel in June, 1973, and sailed until he again left the vessel shortly before the October, 1973 trial.

Cross-examination of the plaintiff began on the afternoon of October 1, 1973, after the testimony of plaintiff's two medical experts had been completed out of turn. Because plaintiff had denied previous left shoulder symptomotology on direct (42a), he was questioned about a 1962 accident involving the left shoulder reported in the medical records (73a). He was also questioned about a fall on a freshly mopped floor at the National Maritime Upgrading School in 1971, again involving the left shoulder (87a). Cross-examination of the plaintiff suspended that afternoon for the testimony of defendant's medical expert which was not completed until the morning of October 2, 1973. Cross-examination of the plaintiff then continued, commencing with his first accident on the Carbide Texas City (148a). He was first questioned about the one previous occasion, two days before the accident, when he had claimed he had noticed water leaking from the refrigerator (156a, 157a):

"Q. Two days before that, March 25th?

A. Yes.

Q. You say you saw the refrigerator leaking?

"A. I saw the crewmessman mopping in front of it. I didn't know, I didn't see it is leaking, but I saw the messman, Norwood, mopping, with a mop in his hand."

Again when asked about the only previous time he had seen the "leak," plaintiff conceded (159a):

"A. I didn't see the refrigerator leaking. I only know on what he told me, that the refrigerator is leaking.

Q. Forget what he told you. This is the only time you saw water on the floor, is that right?

A. I didn't see no water. But he was mopping."

Plaintiff then admitted that the deck of the messroom was dry each time he walked through it the following day, March 26 (159a). He further conceded that on the morning of his accident, March 27, the deck of the messroom was "dry" on his four or five trips through the area before 11:15 a.m. (165a). Even at the moment he slipped, he acknowledged that the deck "looked clean and shiny. . . It doesn't look wet" (175a).

It was at this critical stage in plaintiff's cross-examination, when it began to appear that there was no competent evidence of a leak and that instead plaintiff had merely slipped on a freshly mopped deck, that the Court issued its first

and only warning to defendant to complete cross-examination of the plaintiff in five minutes (174a). Later, in ruling on the post-trial motion, the Court indicated that this distinction between a fall caused by a leaking "unseaworthy" refrigerator as opposed to a fall simply resulting from walking across a freshly mopped deck was "pointless" (245a). At this state in the proceeding, the Court impatiently erased the distinction by stating in the jury's presence "The man slipped and fell" (178a). The time limitation was announced just as plaintiff's actual powers of observation were being questioned. In the two minutes of questioning that followed, plaintiff conceded that he had only taken a "fast look" at the deck being mopped before venturing forth across the messroom. He then described the actual manner in which he fell against the bulkhead, but not to the deck. The Court then interrupted with several questions about the weather on the morning in question. When counsel began to pursue this line of questioning, the Court announced that the five minutes had expired. The following colloquy then took place:

"THE COURT: Yes. And that is your time limit, Mr. Carr.

MR. CARR: I have a few more questions.

THE COURT: I'm sorry. You had this witness under cross-examination for about an hour and a half.

MR. CARR: Sir, I just started this morning.

THE COURT: The man slipped and fell, No, you are through.

Any rebuttal?

MR. LEVINE: No, sir.

THE COURT: All right. Next witness.

MR. CARR: Your Honor, I would like - -

THE COURT: You are excused.

MR. CARR: I would like to question the witness about the - -

THE COURT: No. I've warned you. I told you four times. You are through.

MR. CARR: - - the refrigerator door.

THE COURT: No, Mr. Carr. Sit down."
(177a-178a)

Defense counsel went as far as he could reasonably have gone to alert the Court to significant unfinished cross-examination. As a result, the limitation was enforced before defense counsel was permitted to pose a single question regarding the disputed medical issues, or any questions regarding the 1973 accident involving the refrigerator door in the chill box. The strange facts of that accident and its questionable

relationship to the incident in suit, were left unchallenged.

On summation, plaintiff's attorney argued that the residual weakness in the left shoulder was directly responsible for the injury to the left hand which was caught by the heavy insulated door when it swung closed (219a). Indeed, the Court picked up this argument in reviewing the evidence, and charged the Jury that:

> "Because of the weakness of his shoulder he was unable to stop the door that was swinging toward him, or something, and that he got his finger, his little finger, caught in the door at that time and he suffered more injuries and some furtherlost time because of that. That's the claim. . ." (225a)

Later, the Court, instructing the Jury on damages, stated:

> "In this connection, on the finger injury, he is entitled to recover for that if you find that it was a result of, or caused by, a weakness in the shoulder which resulted from the negligence or unseaworthiness of this ship in the first place, in other words, that it flowed directly from the first injury and that that injury, that first injury, was caused by negligence or unseaworthiness." (231a)

Aside from a brief and interrupted cross-examination of the plaintiff concerning his income tax records and

his early medical history on the afternoon of October 1, cross-examination of the plaintiff was confined to facts involving liability on only the first accident. Before plaintiff was asked a single question about the rather bizarre second accident, cross-examination was terminated by the Court. In addition to the mechanical improbability of checking a door to one's right with the left shoulder, the causal relationship between the two accidents became more tenuous in a self-contradiction in his direct testimony. At first plaintiff stated:

> "A. As soon as I put my shoulder against the door, my left arm went numb." (34a)

Three questions later during the same sequence in his direct testimony, he stated:

> "A. I put it as I did so many, many times on other ships. But as soon as I had my left shoulder against the bulkhead, my left arm went numb." (Emphasis supplied, 35a).

Nor was defendant able to cross-examine plaintiff with the statement signed by the plaintiff aboard the vessel contained in the Report of Personal Injury (Defendant's Exhibit E 241a) regarding the second accident in which plaintiff made no mention whatsoever of shoulder involvement.

Nor was defendant given the opportunity to question plaintiff about the fact that his left shoulder was not mentioned by him aboard ship or treated during his first three clinic visits ashore following the finger fracture (March 12, March 15, and again, March 15. Plaintiff's Exhibits 5 and 7).

As a result of the finger fracture, plaintiff was under treatment from March 11 until May 10, 1973, and therefore claimed an additional two months disability -- a total disability period of 5-1/2 months (220a). He also claimed additional lost earnings of $1,500 -- for total lost earnings of $4,000. In other words, nearly 40% of plaintiff's special damages was based solely on the second accident. The denial of cross-examination can hardly be characterized as "harmless," as the Trial Court contended. Furthermore, the pain and suffering ("I never have a pain like my left shoulder before" 34a) and the permanency claim depended to a large extent on the details of the second accident about which defendant was not permitted to inquire. Dr. Benjamin Golub, the second medical expert called by the plaintiff and the only physician who examined plaintiff after the second accident, was specifically asked about the refrigerator door incident. Dr. Golub, of course, replied that this

kind of trauma could "certainly cause severe pain" (99a) and that the second incident constituted "an aggravation, a painful aggravation of his pathology at that time." (99a) Dr. Golub concluded that, following his second examination, his prognosis for the plaintiff was still guarded:

> "Q. What is your prognosis, doctor?
>
> A. Well, on the basis of two examinations over a fair period of time with the initial examination again after a fair period of time and with the residual findings, I would say the prognosis is guarded, the outlook is not particularly good for significant improvement from this status." (99a) (Emphasis supplied)

The Court even abbreviated the 5 minute limitation, despite protestations by defense counsel that he hadn't touched upon the "refrigerator door" accident (178a). In rejecting the appeal to continue, the Court concluded "You are through." As the verdict turned out, this warning was prophetic.

POINT I

DENIAL OF THE RIGHT TO CROSS-EXAMINE A PARTY ON A SIGNIFICANT ELEMENT OF THAT PARTY'S DIRECT EXAMINATION CONSTITUTES AN ABUSE OF THE TRIAL COURT'S DISCRETION REQUIRING A NEW TRIAL.

The Supreme Court in Alford v. United States, 282 U.S. 687, 691 (1930) has clearly held that "cross-examination of the witness is a matter of right. . ." This holding involved the refusal of the trial court to permit a single question of a prosecution witness about that witness' residence address so as to later offer independent testimony of his reputation for veracity in his neighborhood. Collateral as that purpose may have been, the Supreme Court warned:

> "It is the essence of a fair trial that reasonable latitude been given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop."

There, defense counsel was unable to state in what way the answer to the one excluded question might be probative. In this case, an entire line of questioning regarding the refrigerator door, the second major element of plaintiff's two-fold claim was left unchallenged because of the Court's ruling in the interest

of time. The trial court's wish to conclude two cases in that one day, October 2, 1973, severely prejudiced defendant's basic right of cross-examination.

> "The control of cross-examination is within the discretion of the trial court, but it is only after a party had had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative." (Emphasis supplied). See also Lindsey v. U. S., 133 F. 2d 368, 369; J.E. Hanger, Inc., v. U.S. 160 F. 2d 8, 10 (D.C. Cir. 1947).

The courts have uniformly held that the right of cross-examination is fundamental in our judicial system. United States v. Jorgenson, 451 F. 2d 516, 519 (10 Cir. 1971). Cert denied 1972, 92 S. Ct. 959). A full cross-examination of the witness upon subjects developed during his direct examination is the absolute right, not the mere privilege, of the party against whom such witness is called. Denial of this right is prejudicial error. Minner v. United States, 57 F. 2d 506, 512 (10 Cir. 1932). Wigmore states that length of time, in itself, is not grounds for exclusion of testimony or evidence. "Time becomes important only as affording an opportunity for that confusion of issues which may justly furnish a real intrinsic cause of the failure of justice." 7 Wigmore §1865. No confusion of issues warranted a time limit here when the second major issue in the case had not been tested on cross.

In those cases affirming the trial court's discretion in controlling the presentation of evidence, there has been ample showing that the Court restricted the right of cross-examination "only after the area had been adequately explored." Gordon v. U.S., 438 F. 2d 858 (5 Cir. 1971), at page 865. The logic of this position was set forth in United States v. Pugh, 436 F. 2d, 222, 225 (D.C. Cir. 1970):

> "The trial court does not have the same discretion in limiting cross-examination as in curtailing the impeachment of a witness on a collateral issue. Further, while he can restrict cross-examination for reasons, among others, of relevancy, materiality or prejudice on new matters first broached, the trial judge may not restrict the right of cross-examination by the defense on a matter brought out before the jury on direct until that right has been substantially and fairly exercised." (Emphasis supplied)

Although most cases involving this question have understandably arisen in criminal law, the courts recognized the same fundamental rights in civil matters holding that reversible error is committed when there has been a complete denial of access to an area that is properly the subject of cross-examination.

In a malpractice action, Harries v. United States, 350 F 2d 231, (9 Cir. 1965) the trial court limited the cross-examination of a medical witness after

an exhaustive questioning of the doctor on the stand. On appeal, it was argued that this constituted an abuse of the trial court's discretion in limiting the cross-examination of the witness. The Circuit Court acknowledged that the right to cross-examine a witness was fundamental in our judicial system, and that the extent to which the cross-examination shall be allowed rests within the sound discretion of the trial court. After reviewing the medical testimony, the Circuit Court felt that the trial court had not abused its discretion in calling a halt on the basis of indicated time limitations. However, in so holding, the Court observed:

> "Had counsel for plaintiff presented the court with an offer of proof indicating the crucial new areas needed to be explored, further latitude in the cross-examination of Dr. Lanette might have been indicated and doubtless would have been permitted."

In the case at bar, such an offer of proof was made to the Court when defense counsel requested an opportunity to cross-examine regarding the second accident involving the "refrigerator door," an area which had up to that point not been touched on cross-examination of plaintiff's second unwitnessed accident.

In Sleek v. J.C. Penney Co., 324 F 2d 467 (3 Cir. 1963) the Court again, in adopting the language of Short v. Allegheny Trust Co., (1938) 330 Pa. 55 that "cross-examination of a witness may embrace any matters germane to the direct examination, qualifying or destroying it, or tending to develop facts which have been improperly suppressed or ignored by the party who is called as a witness," ruled that the curtailing of cross-examination by the District Court was too restrictive. The error, however, was felt not to be prejudicial since the contradiction which counsel was attempting to develop had been demonstrated elsewhere during the course of the trial and was not, therefore, prejudicial. No such opportunity was afforded here as plaintiff was his only fact witness.

This Circuit has held that reversible error was committed in a seaman's action when cross-examination of a medical witness was curtailed. Ulm v. Moore-McCormack Lines, 115 F. 2d 492, 496. The same result occurred in Atlantic v. Greyhound Lines, 157 F. 2d 260, 272 (D.C. Cir. 1946), where the trial court refused to permit a question on cross-examination of the plaintiff concerning the legibility of his signature on the day after the accident when plaintiff claimed he was unconscious.

Either through the Court's misapprehension that this vital area had been covered, or simply because of pressure on the Court to conclude two other matters on trial before it simultaneously (". . .nudging of the lawyers that I may have made to move his case along -- you can see we have more business waiting in the back of the Courtroom. . ." 233a), this vital aspect of the testimony in chief stood untested and unchallenged. This ruling was more than simple housekeeping or "nudging." It constituted a denial of the basic right of cross-examination, so jealously protected by our system.

CONCLUSION

A FUNDAMENTAL RIGHT OF THE DEFENDANT HAVING BEEN DENIED, A NEW TRIAL IS REQUIRED.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

BALECHA,
Plaintiff-Appellee,

against

UNION CARBIDE CORP.,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James Steele, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the **28th** *day of* **May** *19* 74 *at* **299 Broadway M , New York**

deponent served the annexed Appellant's Brief *upon*

Joseph Friedberg-Attorney for Plaintiff-Appellee

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this **28th** *day of* **May** *19* 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975